In the Court of Appeals of the State of Alaska

Steven C. Bachmeier, Petitioner, v. **State of Alaska,** Respondent.	Court of Appeals No. **A-13905** **Order** Petition for Review Date of Order: **July 14, 2022**

Trial Court Case No. **3SW-15-00039CR**

Before: Wollenberg, Harbison, and Terrell, Judges

Steven C. Bachmeier filed a petition seeking interlocutory review of a trial court order appointing counsel over Bachmeier's objection. For the reasons explained in this order, we GRANT the petition for review and REMAND this matter to the trial court to reconsider Bachmeier's request for self-representation.

Background facts and proceedings

Steven Bachmeier is charged with first- and second-degree assault for the 2012 stabbing of another inmate at the Spring Creek Correctional Center.[1] The State filed these charges in 2015, and on September 12, 2019, Superior Court Judge Michael MacDonald held a hearing to consider Bachmeier's request for self-representation.[2]

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[1] AS 11.41.200(a)(1)-(2) and AS 11.41.210(a)(1), respectively. Bachmeier is also charged with tampering with evidence under AS 11.56.610(a)(1) and promoting contraband under AS 11.56.375(a)(1).

[2] In the years prior to this hearing, Bachmeier represented himself for part of the time and was represented by an attorney for part of the time.

During the hearing, Judge MacDonald engaged in an extensive colloquy with Bachmeier. At the close of the hearing, the judge concluded that Bachmeier understood the benefits of having an attorney and the dangers of proceeding without one. He also found that Bachmeier understood the charges, including their elements and the possible penalties he would face if convicted. The judge nevertheless denied Bachmeier's request for self-representation, finding that, although Bachmeier understood that he was required to follow court rules and procedures, he was unwilling to do so and that he would be unduly disruptive.

Approximately eighteen months later, on March 26, 2021, Superior Court Judge Bride Seifert conducted a hearing to determine whether circumstances had changed such that Bachmeier was now able to represent himself. Judge Seifert expressed concern as to whether Bachmeier would "conduct himself in accordance with the rules for courtroom behavior," but she found that Bachmeier understood that he was required to follow the court's orders and the rules of court and that he was respectful and coherent throughout the proceeding. She accordingly found, "with hesitation," that Bachmeier was "minimally capable of presenting his case," and she granted Bachmeier's request to proceed without counsel. Judge Seifert's order did not specifically reference Judge MacDonald's previous findings.

The State then filed a motion for reconsideration, asserting that Judge Seifert had failed to consider Judge MacDonald's findings that Bachmeier was unwilling to conduct himself in accordance with court rules and procedures. (The State also argued that the judge had improperly conducted the inquiry into Bachmeier's ability to represent himself outside the presence of the prosecutor.) Judge Seifert granted the State's motion

and scheduled a representation hearing before the judge assigned to Bachmeier's case, Superior Court Judge Lance Joanis.

On August 25, 2021, Judge Joanis conducted a representation hearing at which he heard testimony from Bachmeier. Judge Joanis acknowledged both Judge MacDonald's and Judge Seifert's orders, and he recognized that, if circumstances had changed such that Judge MacDonald's findings were no longer valid, Bachmeier should be permitted to represent himself. However, after hearing Bachmeier's testimony, Judge Joanis found that "nothing ha[d] changed" since Judge MacDonald entered his findings, and he denied Bachmeier's request for self-representation. This petition followed.

Why we remand for reconsideration of Bachmeier's request

In *Faretta v. California*, the United States Supreme Court recognized that a criminal defendant has a constitutional right to self-representation.[3] Alaska's appellate courts have also recognized the right to self-representation.[4] In fact, this Court has consistently recognized that, if a defendant knowingly waives their right to counsel, self-representation may be denied only "if the defendant is not minimally capable of presenting their case in a coherent fashion . . . [or] if the defendant is not capable of conducting their defense without being unusually disruptive."[5]

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[3] *Faretta v. California*, 422 U.S. 806, 812-34 (1975).

[4] *See, e.g.*, *McCracken v. State*, 518 P.2d 85, 88-91 (Alaska 1974); *Falcone v. State*, 227 P.3d 469, 472 (Alaska App. 2010).

[5] *Falcone*, 227 P.3d at 472 & n.11 (citations omitted); *see also Shorthill v. State*, 354 P.3d 1093, 1110, 1098 (Alaska App. 2015) (explaining that a defendant must be capable of (continued...)

In this case, there is no dispute that Bachmeier knowingly waived his right to counsel and that he is minimally capable of presenting his case in a coherent fashion. As a result, the trial court must permit Bachmeier to represent himself unless he "deliberately engages in serious and obstructionist misconduct."[6]

Because of the importance attached to the right of self-representation, the standard for what constitutes "serious and obstructionist misconduct" or "unusually disruptive" conduct is demanding. A trial court may not "override a defendant's right of self-representation merely because a defendant is unfamiliar with court procedures, or has some difficulty understanding the pertinent rules, or advances unusual legal theories, or because it would generally be more convenient for the court if the defendant had a lawyer."[7] Instead, what is required is "'deliberate dilatory or obstructive behavior' [that] threatens to subvert 'the core concept of a trial' . . . or to compromise the court's ability to conduct a fair trial."[8]

Moreover, as Professor LaFave has noted, when a defendant has knowingly waived the right to counsel, trial courts generally will not deny self-representation unless the defendant is first permitted to proceed without an attorney for a period of time and

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[5] (...continued)
"basic tasks" such as "organization of the defense, making motions, arguing points of law, participating in voir dire, questioning witnesses, and addressing the court and jury").

[6] *Faretta*, 422 U.S. at 834 n.46.

[7] *Shorthill*, 354 P.3d at 1098.

[8] *People v. Carson*, 104 P.3d 837, 841 (Cal. 2005) (quoting *United States v. Daugherty*, 473 F.2d 1113, 1125 (D.C. Cir. 1972), and citing *Illinois v. Allen*, 397 U.S. 337, 343 (1970)).

then engages in misconduct that warrants the abridgment of this important constitutional right.[9] "[I]n exceptional situations, the defendant's behavior in the course of seeking to obtain self-representation may in itself be disruptive and thereby justify denying his pro se motion."[10] In evaluating a defendant's request for self-representation, a trial court may consider the defendant's current behavior and their behavior in prior litigation.[11]

Here, Judge Joanis reviewed the representation hearings conducted by Judge MacDonald, Judge Seifert, and himself. He also reviewed hearings that were held in 2020 and 2021, prior to the representation hearing held before Judge Seifert, when Bachmeier was represented by counsel. Based on this review, Judge Joanis found that Bachmeier had "continued the same type of behavior" that formed the basis for Judge MacDonald's September 2019 ruling and also found that Bachmeier was "very willing to, and likely will . . . disrupt proceedings."[12]

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[9] 3 Wayne R. LaFave, et al., *Criminal Procedure* § 11.5(d), at 869 (4th ed. 2015).

[10] *Id.*

[11] *See, e.g.*, *United States v. Mosley*, 607 F.3d 555, 558-59 (8th Cir. 2010).

[12] In reaching his decision, Judge Joanis also considered letters written by Bachmeier in 2015, 2016, and 2017. According to Bachmeier, the judge should not have considered these letters because they are not relevant to whether he is currently willing and able to abide by court procedures. We agree with Bachmeier that the ultimate question is whether Bachmeier's recent conduct shows that he will engage in serious and obstructionist misconduct in the courtroom, and that the two older letters (written to the Alaska Board of Parole and to the Alaska Commission on Judicial Conduct) are only slightly probative of this question. However, Bachmeier sent the most recent of the letters directly to the court, in an apparent effort to disqualify the assigned judge. And it appears that Judge Joanis considered the other two letters, which were written to entities within the justice system, to be evidence of Bachmeier's willingness to engage in obstructive conduct, albeit outside the courtroom,

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But Judge Joanis did not consider the hearings at which Bachmeier actually represented himself — *i.e.*, the hearings between the date that Judge Seifert allowed Bachmeier to represent himself and the date that his *pro se* status was rescinded. To the extent the court is concerned about Bachmeier's courtroom behavior when self-represented, these hearings would seemingly provide the best evidence of Bachmeier's current willingness to comport his conduct with court rules. And our preliminary review of these four hearings (April 14, 2021, May 3, 2021, May 25, 2021, and June 11, 2021) suggests that Bachmeier's behavior was unremarkable and that he followed the applicable court rules.

Moreover, the record shows that, during both of the representation hearings themselves — *i.e.*, the hearing held in March 2021 before Judge Seifert and the hearing held in August 2021 before Judge Joanis — Bachmeier's conduct comported with court rules and protocol. Indeed, at the August hearing, Bachmeier told the court that he now understands that when he does not agree with the court or opposing counsel, he should make his objection and move on, and he indicated a willingness to do this. Our review of the only recent substantive hearing at which Bachmeier appeared *pro se* shows Bachmeier adhering to this principle.

Given the constitutional nature of the right of self-representation, and also the court's heavy reliance on the 2020/2021 hearings at which Bachmeier was represented by counsel before being allowed to proceed *pro se*, we conclude that it is

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[12] (...continued)
and thus as circumstantial evidence that he would be equally willing to engage in such behavior in order to disrupt the court proceedings. We accordingly conclude that it was not improper for the court to have considered these letters.

necessary for the trial court to consider Bachmeier's recent conduct as a self-represented litigant as part of its inquiry. We are not willing to assume, as the dissent does, that a review of these additional court proceedings would have no impact on the trial court's decision, nor do we agree with the dissent that the trial court is certain to conclude that any improvement in Bachmeier's behavior at recent court proceedings simply represents manipulative behavior by Bachmeier. It is not our role to make these findings in the first instance, and we decline to affirm the court's findings on an incomplete review of the record.

Because Bachmeier has knowingly and intelligently waived his right to counsel, he should be permitted to represent himself unless his recent behavior, particularly his recent behavior as a *pro se* litigant, suggests that he is unable or unwilling to conduct himself with the appropriate courtroom decorum and without being unusually disruptive to court proceedings.

Accordingly, we REMAND this case to the superior court to conduct further proceedings regarding Bachmeier's request for self-representation. On remand, the superior court shall enter findings with regard to whether Bachmeier acted appropriately during the recent hearings at which he appeared *pro se* and shall consider these findings in its overall evaluation of Bachmeier's request for self-representation.

Judge TERRELL, dissenting.

As noted in the majority order, Steven Bachmeier's request to represent himself was denied by Judge Michael MacDonald in September 2019. A renewed request for self-representation was granted by Judge Bride Seifert in March 2021, and

after the State moved for reconsideration, Judge Lance Joanis took testimony on the matter before denying Bachmeier's self-representation request in September 2021. Judge Joanis concluded that Bachmeier would not be able to comply with the requirements of courtroom decorum and would engage in obstructionist misconduct. Judge Joanis concluded that Bachmeier's behavior was "gamesmanship in an attempt to effectuate some end result." Judge Joanis found that if Bachmeier was permitted to represent himself, "Mr. Bachmeier would still engage in conduct, and it is a knowing and intentional course of conduct, to be disruptive. He understands the proceedings enough to disrupt them and he will do that."

My colleagues conclude that the matter should be remanded to the trial court so that it can consider whether Bachmeier's behavior at several hearings — those that occurred after Judge Seifert granted his self-representation request — suggests that he would be able to conduct himself appropriately at trial. I conclude that such a remand is unwarranted and that Judge Joanis had an adequate basis to conclude that Bachmeier's recent improvement in deportment at pretrial proceedings was simply gamesmanship, and that if he represented himself, his misconduct would reassert itself.

The majority's order sets out the factors that trial courts must consider in evaluating a criminal defendant's request for self-representation, and in particular the factor that is at issue here, whether the defendant will abide by the rules of courtroom decorum and not engage in "unusually disruptive" behavior.[1] And as the majority notes,

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[1] This involves behavior such as threats or witness intimidation, frequent interruptions that impair the jury's ability to receive evidence and testimony in a cohesive and coherent fashion, refusals to abide by the trial judge's rulings, repetitive filing of motions, last-minute litigation moves that are intended to delay the proceedings, and obstinacy so

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this is a demanding standard because defendants have a constitutional right, albeit one that is not absolute, to engage in self-representation. The only thing I would add to the majority's description of the law on this point is that we and other courts have traditionally reviewed trial courts' rulings on whether a defendant should be denied self-representation on the basis of potentially disruptive or obstructionist behavior under the abuse-of-discretion standard.[2]

Judge Joanis did not abuse his discretion in concluding that Bachmeier's conduct met this standard. To begin, during the representation hearing in front of Judge Joanis, Bachmeier expressed a fundamental outlook that portended his desire to engage in obstructive conduct and his belief that he was morally justified in doing so. Bachmeier argued that the entire United States government was illegal, because the

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[1] (...continued)
pronounced that it is "virtually impossible [for the court] to hold any meaningful discussion of his case [with the defendant]." *Jensen D. v. State, Dep't of Health & Soc. Servs.*, 424 P.3d 385, 388-89 (Alaska 2018) (quoting *Falcone v. State*, 227 P.3d 469, 474 (Alaska App. 2010)); *see also, e.g.*, *id.* (talking so frequently at counsel table that it interfered with the testimony of other witnesses); *Barry H. v. State, Dep't of Health & Soc. Servs.*, 404 P.3d 1231, 1235 (Alaska 2017) (interruptions; persisting in eccentric defenses to the point it was virtually impossible to hold any meaningful discussions); *Lampley v. State*, 33 P.3d 184, 189 (Alaska App. 2001) (threats against judge; statement that defendant is going to have to "fight for what's mine" and start killing people; generally obstreperous behavior); *Debeaulieau v. State*, 2016 WL 4490805, at *3 (Alaska App. Aug. 24, 2016) (unpublished) (refusing to abide by trial court's rulings rejecting defendant's theories; interrupting court); *Tix v. State*, 2011 WL 2437680, at *4-5 (Alaska App. June 15, 2011) (unpublished) (threats to counsel; witness intimidation; refusing to follow court orders).

[2] *See, e.g.*, *Falcone v. State*, 227 P.3d 469, 473 & n.18 (Alaska App. 2010) (citations omitted); *Barry H.*, 404 P.3d at 1235 & n.13 (applying *McCracken* in a child-in-need-of-aid proceeding); *Hummel v. Commonwealth*, 306 S.W.3d 48, 53 (Ky. 2010); *People v. Carson*, 104 P.3d 837, 843 (Cal. 2005).

Founders "never had the authority" to enact the Constitution. Bachmeier argued that by derivation, the government of the State of Alaska was similarly illegitimate. Bachmeier asserted that the State of Alaska's act of prosecuting him constituted an act of war, and that he was therefore entitled to take any actions against State actors (including the judge and prosecutor) that were justified by the laws of war, *i.e.*, Bachmeier implied that he was entitled to try to kill these entities that he believes he is at war with.

Bachmeier has long engaged in threats designed to impede the ability of key actors in his criminal cases to perform their functions. In 2010, Bachmeier threatened Kenai Superior Court Judge Anna Moran and her family while she presided over his criminal case. In 2015, in a letter to the Alaska Parole Board, he stated that he was authorized to commit murder. In late 2016, in a letter to the Alaska Commission on Judicial Conduct, Bachmeier stated that he "declare[d] under penalty of perjury I will never stop killing the citizens of Alaska if Greenstein [the executive director of the commission] is not fired." He further stated, "You think this shit is funny? Under Federal law, 'an act of WAR is a declaration of WAR.' I accept the State[']s declaration of war. Fear for your lives." And in February 2017, in a change-of-name proceeding in Kenai superior court, Bachmeier again threatened Judge Moran, stating that "I have told her in [the] past I'm going to kill her family which I still entend [sic] to do."[3] (Bachmeier later conceded that he made these threats for strategic reasons, as an effort to try and get Judge Moran disqualified from his case.)

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[3] For this conduct, Bachmeier was prosecuted by the United States for sending threatening communications through the mail, in violation of 18 U.S.C. § 876(c). His conviction was affirmed in *United States v. Bachmeier*, 8 F.4th 1059 (9th Cir. 2021).

Bachmeier also has a history of failing to appear for court proceedings. In a prior case, Bachmeier failed to appear after the first day of trial. And in this case, Judge MacDonald noted in his September 2019 order denying Bachmeier's request for self-representation that Bachmeier had failed to appear at multiple hearings in the case. Judge Joanis, in his decision on record in this case, noted four additional proceedings where Bachmeier had failed to appear before him or hung up precipitously and terminated his presence at telephonic hearings.

Bachmeier engaged in numerous other acts designed to obstruct the proceedings. For example, Bachmeier claimed at the September 2019 hearing before Judge MacDonald that he was not the person named in the complaint, said that he was not Steven C. Bachmeier and that his identity was distinctive from whatever name he might have been given, and claimed that whatever knowledge he had of his date of birth amounted to hearsay. At an August 2020 hearing in front of Judge Joanis, Bachmeier stated that he did not consent to anything that was happening, that the court was conspiring against him in an act of war, that "we are at war," and hung up the phone, thereby abruptly terminating the telephonic hearing. At a September 2020 hearing, Bachmeier said that "I object to everything you guys are doing," told the court to "stop harassing me," and again hung up the phone, ending the hearing. At a December 2020 hearing, Bachmeier repeated his assertion that the court lacked jurisdiction over him because he was not the Steven C. Bachmeier named in the complaint.

It is unnecessary to recount all the other misconduct and obstructionist behavior identified in Judge MacDonald's September 2019 order or in Judge Joanis's September 2021 order. My point is simply that we have affirmed, as not an abuse of discretion, trial courts' decisions denying self-representation on similar and on less

egregious records of prior behavior. I cannot conclude that Judge Joanis abused his discretion in concluding that Bachmeier would seriously disrupt trial proceedings if allowed to represent himself.[4] Nor do I believe that his conclusion would change if he reviewed the additional court proceedings that the majority directs him to consider.

Implicit in the difference in positions between my colleagues and I is a difference in view as to what the trial judge is required to consider in making such a decision. I agree that Bachmeier's behavior at recent hearings where he represented himself could be probative, but because these were pretrial hearings, I do not think that his behavior at these hearings is significantly probative of what Bachmeier would do at trial. I conclude that trial judges have the right to exercise some discretion in deciding how much of the defendant's litigation history should be looked to in making a decision on a request for self-representation. In my view, Judge Joanis reasonably concluded that any improvement in Bachmeier's behavior at recent court proceedings simply represented gamesmanship. While Bachmeier claimed that he would behave and follow the court's rulings at trial, Judge Joanis, who had the opportunity to evaluate his demeanor credibility, was not obliged to credit Bachmeier's representations, and on the record before him had more than ample basis not to. I therefore respectfully dissent from the order remanding the self-representation issue to the superior court.

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[4] *See, e.g.*, *Lampley*, 33 P.3d at 188-89.

Clerk of the Appellate Courts

/s/ M. Montgomery

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Meredith Montgomery

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